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IN THE

Supreme Court of the United States

OCTOBER TERM, 2003

STANFORD HOSPITAL AND CLINICS, SUCCESSOR TO UCSF STANFORD HEALTH CARE,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 715,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURIAE AMERICAN HOSPITAL ASSOCIATION AND ASSOCIATION OF AMERICAN MEDICAL COLLEGES IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The American Hospital Association (AHA),[1] founded in 1898, is the national advocacy organization for hospitals in

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[1] In accordance with Rule 37.6 of the Court, counsel represents that no part of this brief was authored by counsel

this country. It represents approximately 5,000 hospitals, health systems, networks, and other care providers. AHA's mission is to promote high quality patient care through leadership and representation of, and service to, healthcare provider organizations committed to meeting the healthcare needs of their communities.

The Association of American Medical Colleges (AAMC), founded in 1876, represents the nation's 126 medical schools, nearly 400 major teaching hospitals, and their administrative leadership; faculty in academic and scientific societies; and medical students and residents. AAMC's mission is to improve public health by enhancing the effectiveness of academic medicine. It supports its members in carrying out their responsibilities for education, research, development, and the provision of patient-care services in academic settings.

Hospitals are dedicated to protecting and promoting the physical and emotional well-being of patients. Doing so requires that hospitals adopt policies and procedures to protect and promote patient safety, quality of care, individual privacy and other aspects of care and treatment essential to achieve their mission. That is why amici are concerned about the implications of the D.C. Circuit's holding that a hospital cannot "prohibit[] its employees from . . . soliciting and distributing materials to . . . all nonemployees throughout the hospital." Pet. App. at 2a. The decision effectively permits direct solicitation of patients, their families, and friends by employees or anyone else on hospital premises. It will impair amici's member hospitals' ability to protect and promote

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for a party and that no person or entity other than amici made any monetary contribution to the preparation or submission of this brief.

essential aspects of care, including, as described by Justice Brennan in *Beth Israel Hospital* v. *National Labor Relations Board*, 437 U.S. 483 (1978), "tranquil" patient-care settings. *Id.* at 495 (quoting *St John's Hosp. & Sch. of Nursing, Inc.*, 222 N.L.R.B. 1150, 1150 (1976)).

This brief is filed with the consent of the parties. Copies of the consent letters have been filed with the Clerk.

SUMMARY OF ARGUMENT

As this Court and the National Labor Relations Board long ago recognized, hospitals have a compelling interest in providing patients, their families, and friends with an environment conducive to the highest quality medical care. Because of hospitals' patient-care mission, the law is clear that even solicitation and distribution *among employees themselves* are presumptively harmful and may be completely banned in areas of a hospital where patients are most likely merely to witness such activities. It necessarily follows that any *direct* solicitation of or distribution to patients -- which can be far more intrusive -- can be proscribed for the same reasons, regardless of where it occurs on a hospital's premises.

The D.C. Circuit decision undermines hospitals' ability to provide an environment conducive to the highest quality medical care by failing to allow hospitals to determine that it is in patients' best interests for employees not to solicit or distribute literature to them, their families, or friends. When there are so many other outlets that afford employees access to the general public and that do not have the potential to affect patient care, the court's holding that employee solicitations of and distributions to patients are presumptively not disturbing to the patient-care environment seems particularly inapt. That presumption also is contrary to the

Board's own precedents. In the best interests of patients, hospitals must be allowed to retain the flexibility to adopt rules prohibiting such activities on all or some of their premises so long as the rules are rational and consistently applied.

ARGUMENT

THE D.C. CIRCUIT'S HOLDING THAT HOSPITALS CANNOT PROHIBIT THEIR EMPLOYEES FROM DIRECTLY SOLICITING PATIENTS, THEIR FAMILIES, AND FRIENDS COULD UNDERMINE PATIENT CARE AND IS CONTRARY TO PATIENTS' BEST INTERESTS AND SETTLED LAW

A. HOSPITALS HAVE A COMPELLING INTEREST IN PROVIDING THE HIGHEST QUALITY MEDICAL CARE

Twenty-five years ago this Court recognized that " 'the primary function of a hospital is patient care and that a tranquil atmosphere is essential to the carrying out of that function.' " *Beth Israel,* 437 U.S. at 495 (quoting *St. John's Hosp.*, 222 N.L.R.B. at 1150). That is so because:

> "Hospitals, after all, are not factories or mines or assembly plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activities, and where the patient and his family -- irrespective of whether that patient and that family are labor or *management* oriented -- need a restful, uncluttered, relaxing, and helpful atmosphere, rather than

> one remindful of the tensions of the marketplace in addition to the tensions of the sick bed." [*NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 772, 783 n.12 (1979) (quoting *Beth Israel*, 437 U.S. at 509 (Blackmun, J., concurring in judgment) (emphasis in original).]

In *Beth Israel* the Court concluded that hospitals' patient-care focus justified the NLRB's adoption of a unique set of rules to govern employee solicitation and distribution policies in healthcare institutions. Under these rules, a hospital may ban all solicitation in "strictly patient care areas," including employee-to-employee communications, because any solicitation or distribution in those areas is presumptively unsettling to patients. In all other areas the hospital must show that the solicitation or distribution is likely to disrupt patient care or disturb patients. *Beth Israel*, 437 U.S. at 495.

At the same time that it approved the foregoing rules, the Court also made clear that hospital policies forbidding employee solicitation of and distribution to *nonemployees* are permissible, regardless of where those activities occur on a hospital's premises. *See id.* at 503 & n.23 (stating that "a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients" and suggesting such a rule as a "less restrictive means . . . more nearly directed toward the harm to be avoided" than banning all organizational activity in a cafeteria predominantly serving employees).

The rules approved in *Beth Israel* have been in effect for a quarter of a century. To protect patients' healthcare interests, including their privacy interests, and to balance those interests with employees' Section 7 rights (29 U.S.C. § 157), amici's member hospitals have adopted solicitation and distribution policies that are carefully tailored to the unique

circumstances of each hospital's setting. Some permit only a few limited exceptions, such as an annual United Way drive or other occasional charitable fundraisers. Others are even more restrictive and prohibit even such seemingly innocuous activities as Girl Scout cookie sales.

Hospital solicitation and distribution policies typically cover employee-to-employee, employee-to-nonemployee, non-employee to employee, and nonemployee-to-nonemployee activities. Some hospitals, like Stanford, have provisions such as the rule endorsed in *Beth Israel's* footnote 23 explicitly prohibiting employees from soliciting or distributing materials to nonemployees or patients. It is these rules that the D.C. Circuit's decision calls into question.

B. HOSPITALS' COMPELLING INTEREST IN PATIENT CARE JUSTIFIES GIVING THEM THE FLEXIBILITY TO PROHIBIT EMPLOYEES FROM SOLICITING OR DISTRIBUTING MATERIALS TO PATIENTS AND VISITORS

It is because of hospitals' patient-care mission that the NLRB's rules governing hospital solicitation and distribution policies are already different from those governing other employers. The Board has determined -- with this Court's approval -- that hospitals can forbid employees from soliciting or distributing to other employees in patient-care areas because of the likelihood that merely witnessing such activity " 'might be upsetting to the patients.' " *Beth Israel*, 437 U.S. at 495 (quoting *St. John's Hosp.* at 1150). It necessarily follows from this reasoning that hospitals should also be able to prohibit employees from *directly* soliciting or distributing materials to patients -- by definition a far more intrusive experience. This is clearly why the *Beth Israel* Court endorsed "a rule forbidding any distribution to or

solicitation of nonemployees" as a "less restrictive" means of balancing patients' privacy and employees' speech interests in a nonpatient-care setting, where all solicitation and distribution activities are not automatically prohibited. *Id.* at 503 n.23. *See also Brockton Hosp.* v. *NLRB*, 294 F.3d 100, 104 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003) (citing footnote 23 with approval); *A.W. Schlesinger Geriatric Ctr., Inc.*, 263 N.L.R.B. 1337, 1341 (1982) (same).

In holding that a hospital cannot prohibit its employees from soliciting and distributing materials to nonemployees throughout its premises, the D.C. Circuit gave inadequate weight to hospitals' interest in protecting and promoting patient care and treatment, the importance of which "cannot be gainsaid." *Beth Israel*, 437 U.S. at 505. At the same time, the court failed to recognize that prohibitions on employee-to-nonemployee solicitation and distribution interfere only minimally with hospital employees' Section 7 rights. When not in the hospital setting, patients, their families, and friends (who constitute the vast majority of nonemployees on a hospital's premises each day) are no different from any other members of the public whose support employees might seek to solicit. There are ample other outlets for securing public support (including the media) that would not impinge on patient care. And employees, of course, remain free to communicate with other employees in nonpatient-care areas. Given these alternative avenues of communication, a prohibition on employee-to-nonemployee solicitation and distribution is not an unreasonable restriction on employees' Section 7 rights. *See id.* ("availability of alternative means of communication" may be important factor in hospital solicitation cases).

To be sure, the D.C. Circuit ruling does not invalidate all hospital prohibitions on employee-to-nonemployee solicitations and distributions beyond immediate patient-care areas. Rather, it creates a *presumption* that such activities will not disturb patients or disrupt patient care. Pet App. at

19a. But presumptions cannot stand when they are not rational, are inconsistent with sound public policy, or do not comport with common sense. *See Beth Israel*, 437 U.S. at 493 (validity of Board's presumptions " 'depends upon the rationality between what is proved and what is inferred' " (quoting *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 805 (1945)). *See also, e.g., United States Dep't of Justice* v. *Landano*, 508 U.S. 165, 174 (1993) (presumptions must be " 'supported by considerations of fairness, public policy, and probability, as well as judicial economy' " (quoting *Basic Inc.* v. *Levinson*, 485 U.S. 224, 245 (1988)). The presumption sustained by the D.C. Circuit passes none of these tests.

In both *Beth Israel* and *Baptist Hospital*, this Court expressed serious reservations about the propriety of the Board's presumption that patient care is unlikely to be affected by employee-to-employee solicitation and distribution activities in nonpatient-care areas. *Baptist Hosp.*, 442 U.S. at 789-790; *Beth Israel*, 437 U.S. at 508. This Court should be even more troubled by the Board's and the D.C. Circuit's presumption that patients will experience no detrimental effects from *direct* solicitations and distributions simply because they occur outside of narrowly defined patient-care areas. Patients, their families, and friends can be deeply involved in the most critical aspects of care in virtually any area of the hospital and at any time before, during and after the course of treatment. And expert testimony should not be required to prove that patients presented with views critical of the hospital can become so distraught that the success of their treatment is adversely affected. *See, e.g., Baptist Hosp.*, 442 U.S. at 783 (upholding hospital solicitation rule where medical witnesses testified that "psychological attitudes [of patients] play a good part . . . in determining the success of their treatment"; and that if a patient sees employees have their minds on something other

than patient care, "this is very disruptive to the patient and sometimes affects the patient's ability to recover").

Each hospital understands its unique mix of patients and the ways in which those patients and their families and friends use the hospital's premises. To serve their patients' best interests, hospitals must have the flexibility to adopt rules prohibiting employee solicitation and distribution of materials to patients, families, and friends on all or some of the hospital premises. Hospital policies barring employee solicitation of and distribution to nonemployees should not concern the NLRB so long as those rules are not applied in a discriminatory fashion. *Cf. 6 West Ltd. Corp.* v. *NLRB*, 237 F.3d 767, 780 & n.18 (7th Cir. 2001) ("A restaurant in the United States of America should be free to prohibit solicitations on the premises that interfere with or bother employees or customers, and allow those solicitations which neither interfere with nor bother employees or customers" so long as rules are enforced without discrimination).

Finally, as a matter of public policy it is unreasonable to conclude, as the Board and D.C. Circuit have concluded, that hospitals may not prohibit employees from soliciting patients, families, and friends outside of narrowly prescribed areas on their premises, but that restaurant and retail shop owners are free to prohibit solicitation of customers because such solicitation is "apt to . . . disrupt business." *Goldblatt Bros. Inc.*, 77 N.L.R.B. 1262, 1264 (1948). The interests of patients in America's hospitals deserve *more*, not less protection than those of restaurant and retail customers. *See Beth Israel*, 437 at 508 ("There is, of course, a certain irony when the Board grants protection from solicitation to the retail store and to the Burger Chef and the Hot Shoppe cafeteria, but at the same time denies it to the hospital restaurant facility where far more than mere commercial interests are at stake" (Blackmun, J., concurring in judgment)).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, amici respectfully urge this Court to grant the Petition for a Writ of Certiorari with respect to the question of employee-to-nonemployee solicitation and distribution.

Respectfully submitted,

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